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Lai Fee & Anor v Wong Yu Vee & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-930–08 OF 2020
KAMALUDIN MD SAID, CHE MOHD RUZIMA AND HASHIM HAMZAH JJCA
1 JUNE 2022

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Companies and Corporations — Directors — Fraud on creditors — Appellants claimed against respondents to settle company's debt — Whether respondents carried out company's business with intention to defraud appellants — Whether appellants had misrepresented respondents

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The appellants entered into a sale and purchased agreement dated 11 January 2013 ('the agreement') with Centennial Asia Sdn Bhd ('Centennial') to sell their partnership business known as Fave Enterprise ('Fave') for RM7m ('the purchase price') together with the unrestricted right to extract timber logs on a land ('the land'). Centennial paid RM4.5m as part of the purchase price through Westhill Equity Sdn Bhd ('Westhill') however failed to pay the balance purchase price of RM2.5m to the appellants. The appellants filed a civil suit against the respondents at the High Court in Shah Alam to recover the balance purchase price. Judgment for specific performance to pay the balance purchase price was entered against Centennial. However, the appellants failed to enforce the judgment against Centennial because Centennial did not have any assets and bank account. The appellants filed subsequent action under s 540 of the Companies Act 2016 against the respondents as directors of Centennial to settle Centennial's debt on grounds that the respondents had carried out Centennial business with intention to defraud the appellants as the judgment creditor by failing to disclose that Centennial did not have any source of income during the signing of the agreement instead used Westhill to pay the purchase price. The respondents contended, inter alia, that the appellants had negligently misrepresented the respondents that the extraction of timber logs from the said land area was unrestricted and would bring high profit for Centennial estimated around RM80m. The learned High Court judge ('HCJ') dismissed the appellants' claim and hence this appeal.

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I **Held**, dismissing the appeal:

(1) All the allegations on the intention to defraud were general allegations without specifically stating the time of commission of the fraud. The learned HCJ was correct to conclude that there was no evidence that the respondents were carrying out Centennial's business with the intention

to defraud the appellants after assessing the whole evidence. The appellant had agreed to sign the agreement with Centennial despite Centennial was only registered on 28 June 2012 and without any assets and business. It was not wrong for the learned HCJ to have found that if the appellants were in doubt on Centennial's capability and status, the appellants could always find out from the Company Commission of Malaysia before signing the agreement. This had always been the practice and prudent for parties to do before entering into an agreement. The respondents had no obligation to disclose the payment of purchase price would be made by Westhill. The reasons related to Centennial's assets, financial standing, bank account and business records were only excuses and afterthought. The appellant could not approbate and reprobate after agreed to enter into agreement with Centennial and later alleged that Centennial was used as vehicle to defraud them when Centennial's financial position was never raised before by the appellants and they knew about it. Had the balance purchased price of RM2.5m was paid, the issue of money paid by Westhill would never become an issue. The appellant's argument that the respondents did not plead nor argued their case on the back of s 2(d) of the Contracts Act 1950 had no merit. The issue of law could be raised at any time though not pleaded. There was nothing unusual in the respondents causing the part payment of RM4.5m to be paid via Westhill (instead of Centennial) (see paras 28, 30–33, 35–36 & 39–40).

(2) It was represented to the respondents that the profit from the timber logs extracted from the said land was estimated at RM80m. However, the respondents discovered that a large area of the said land was a restricted area of which timber logging activities are prohibited. Based on the restriction, the profit could not reach RM80m as promised. The respondent only came to know after they paid the payment of RM4.5m. The respondents believed that they would not gain benefit or profit from the said agreement hence, decided not to pay the balance purchase price. The decision not to pay the balance purchase price was a company's decision and was the company's debt. The respondents could not be held liable on the company's debt based on the principle of separate legal entity (see paras 44–45).

[Bahasa Malaysia summary

Perayu-perayu memeterai perjanjian jual beli bertarikh 11 Januari 2013 ('perjanjian') dengan Centennial Asia Sdn Bhd ('Centennial') untuk menjual perniagaan perkongsian mereka yang dikenali sebagai Fave Enterprise ('Fave') pada harga RM7 juta ('harga belian') bersama-sama dengan hak tanpa had untuk mengeluarkan kayu balak di atas satu tanah ('tanah'). Centennial membayar RM4.5 juta sebagai sebahagian daripada harga belian melalui Westhill Equity Sdn Bhd ('Westhill') tetapi gagal membayar baki harga belian

RM2.5 juta kepada perayu. Perayu memfailkan saman sivil terhadap responden di Mahkamah Tinggi di Shah Alam untuk mendapatkan baki harga belian. Penghakiman untuk pelaksanaan spesifik untuk membayar baki harga belian telah dimasukkan terhadap Centennial. Bagaimanapun, perayu gagal menguatkuasakan penghakiman terhadap Centennial kerana Centennial tidak mempunyai sebarang aset dan akaun bank. Perayu memfailkan tindakan seterusnya di bawah s 540 Akta Syarikat 2016 terhadap responden sebagai pengarah Centennial untuk menjelaskan hutang Centennial atas alasan responden telah menjalankan perniagaan Centennial dengan niat untuk menipu perayu sebagai pemiutang penghakiman dengan gagal mendedahkan Centennial tidak mempunyai sebarang punca pendapatan semasa menandatangani perjanjian sebaliknya menggunakan Westhill untuk membayar harga belian. Responden berhujah, antara lain, bahawa perayu telah secara cuai memberi gambaran yang salah kepada responden bahawa pengambilan kayu balak dari kawasan tanah tersebut adalah tidak terhad dan akan membawa keuntungan tinggi bagi Centennial dianggarkan sekitar RM80 juta. Hakim Mahkamah Tinggi ('HMT') yang bijaksana menolak tuntutan perayu dan oleh itu rayuan ini.

Diputuskan, menolak rayuan:

(1) Semua dakwaan mengenai niat untuk menipu adalah dakwaan umum tanpa menyatakan secara khusus masa berlakunya penipuan. HMT yang bijaksana adalah betul untuk membuat kesimpulan bahawa tidak ada keterangan bahawa responden menjalankan perniagaan Centennial dengan niat untuk menipu perayu selepas menilai keseluruhan keterangan. Perayu telah bersetuju untuk menandatangani perjanjian dengan Centennial walaupun Centennial hanya didaftarkan pada 28 Jun 2012 dan tanpa sebarang aset dan perniagaan. Tidak salah untuk HMT yang bijaksana mendapati bahawa jika perayu ragu-ragu tentang keupayaan dan status Centennial, perayu sentiasa boleh mengetahui daripada Suruhanjaya Syarikat Malaysia sebelum menandatangani perjanjian. Ini sentiasa menjadi amalan dan cermat untuk dilakukan oleh pihak-pihak sebelum membuat perjanjian. Responden tidak mempunyai kewajipan untuk mendedahkan pembayaran harga pembelian yang akan dibuat oleh Westhill. Alasan yang berkaitan dengan aset Centennial, kedudukan kewangan, akaun bank dan rekod perniagaan hanyalah alasan dan pemikiran terkemudian. Perayu tidak boleh membenarkan dan menolak selepas bersetuju untuk menandatangani perjanjian dengan Centennial dan kemudiannya mendakwa bahawa Centennial digunakan sebagai kenderaan untuk menipu mereka apabila kedudukan kewangan Centennial tidak pernah dibangkitkan sebelum ini oleh perayu dan mereka mengetahui mengenainya. Sekiranya baki harga belian RM2.5 juta telah dibayar, isu wang yang dibayar oleh Westhill tidak akan menjadi isu. Hujahan perayu bahawa responden tidak memplid

mahupun menghujahkan kes mereka di sebalik s 2(d) Akta Kontrak 1950 tidak mempunyai merit. Isu undang-undang boleh dibangkitkan pada bila-bila masa walaupun tidak dirayu. Tiada apa-apa yang luar biasa dalam responden menyebabkan bayaran sebahagian RM4.5 juta dibayar melalui Westhill (bukan Centennial) (lihat perenggan 28, 30–33, 35–36 & 39–40).

(2) Telah diwakili kepada responden bahawa keuntungan daripada kayu balak yang dikeluarkan daripada tanah tersebut dianggarkan berjumlah RM80 juta. Bagaimanapun, responden mendapati bahawa sebahagian besar kawasan di tanah tersebut adalah kawasan larangan yang mana aktiviti pembalakan adalah dilarang. Berdasarkan sekatan itu, keuntungan tidak boleh mencecah RM80 juta seperti yang dijanjikan. Responden hanya mengetahui selepas mereka membayar bayaran RM4.5 juta. Responden percaya bahawa mereka tidak akan mendapat faedah atau keuntungan daripada perjanjian tersebut oleh itu, memutuskan untuk tidak membayar harga belian baki. Keputusan untuk tidak membayar harga belian baki adalah keputusan syarikat dan merupakan hutang syarikat. Responden tidak boleh dipertanggungjawabkan ke atas hutang syarikat berdasarkan prinsip entiti undang-undang yang berasingan (lihat perenggan 44–45).]

Cases referred to

Chan Kok Thin @ Chan Kok Cheng & Anor v Chan Yock Cher @ Chan Yock Kher & Ors [2000] MLJU 44, HC (refd)

Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)

Chin Chee Keong v Toling Corp (M) Sdn Bhd [2016] 3 MLJ 479, CA (refd)

China Idea Development Ltd v Ooi Kee Liang & Ors and another case [2020] 8 MLJ 527, HC (refd)

Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41b; [1978] 1 LNS 32, PC (refd)

Coleman v The Queen (1987) 5 ACLC 766 (refd)

Dato' Seri Anwar Ibrahim v Tun Dr Mahathir bin Mohamad [2011] 1 MLJ 145, FC (refd)

Director of Forest Sarawak & Ors v Nicholas Mujah ak Ason & Ors [2020] 1 MLJ 612; [2020] 2 CLJ 1, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Jeli Anak Naga & 4 Others v Tung Huat Pelita Niah Plantation & Ors and another appeal [2019] MLJU 1311; [2020] 1 CLJ 449, FC (refd)

Kawin Industrial Sdn Bhd (in liquidation) v Tay Tiong Soong [2009] 1 MLJ 723, HC (refd)

Maybank Islamic Bhd v Aldwich Enviro-Management Sdn Bhd [2015] MLJU 1977, HC (refd)

Merong Mahawangsa Sdn Bhd v Dato Shazryl Eskay bin Abdullah [2015] 5 MLJ 619, FC (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)
Overseas Chinese Banking Corporation Ltd v Woo Hing Brothers (M) Sdn Bhd [1992] 2 MLJ 86, HC (refd)
PBJ Construction Sdn Bhd v Anwar Yeo Abdullah & Anor [2021] 9 MLJ 386, HC (refd)
R v Grantham [1984] QB 675, CA (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] CLJ 584, FC (refd)
Siow Yoon Keong v H Rosen Engineering BV [2003] 4 MLJ 569, CA (refd)
UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2010] MLJU 2225; [2010] 9 CLJ 785, FC (refd)
Watt or Thomas v Thomas [1947] AC 484, HL (refd)
Yahya Mohd Khalid v MISC Berhad [2020] MLJU 77, CA (refd)
Yee Poh Nyen v Raji bin Kasan & Ors [2018] MLJU 1108, HC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 304(1)
Companies Act 2016 s 540, 540(1)
Contracts Act 1950 s 2(d)
Evidence Act 1950 ss 101, 103
National Forestry Act 1984

Appeal from: Civil Suit No BA-22NCVC-203–04 of 2018 (High Court, Shah Alam)

Nashvinder Singh Gill (with Gurdit Singh) (Jeffrey Lee) for the appellant.
Maurice Ernest Scully (M Scully) for the respondents.

Kamaludin Md Said JCA:

INTRODUCTION

[1] The appellants appealed against the decision of the Shah Alam High Court dated 29 August 2020 which dismissed their claim under s 540 of the Companies Act 2016 ('the CA 2016') against the respondents with costs of RM20,000 subject to allocator.

[2] We heard the appeal on 19 August 2021 and having carefully read the grounds of judgment of the High Court judge ('HCJ') and the records of appeal and considered the submissions from the appellants and the respondents, we find there is no appealable error in the learned HCJ's grounds

of judgment. We are satisfied that there is no merit in the appeal. It is our unanimous decision that the appeal is dismissed with costs of RM10,000 subject to allocator.

[3] We provide our reasons as follows.

THE SALIENT FACTS

[4] The appellants entered into a sale and purchased agreement dated 11 January 2013 ('the agreement') with Centennial Asia Sdn Bhd ('Centennial') to sell their partnership business known as Fave Enterprise ('Fave') for RM7m ('purchase price') together with the unrestricted right to extract timber logs on Lot 2438, PT5260, Mukim Ulu Menggiri, Gua Musang, Kelantan with an estimated area of 4,978 acres ('the said land'). Fave has been appointed as contractor by the Perbadanan Pembangunan Ladang Rakyat Negeri Kelantan ('PPLRNK') to extract timber logs, cleaning and selling everything found on the said land.

[5] It is not disputed that the respondents took over the partnership business of Fave replacing the appellants after the appellants withdrew from the partnership business after the agreement was signed.

[6] Centennial paid RM4.5m as part of the purchase price through Westhill Equity Sdn Bhd ('Westhill') however failed to pay the balance purchase price of RM2.5m to the appellants.

[7] The appellants filed a civil suit against the respondents at the High Court in Shah Alam to recover the balance purchase price vide Civil Suit No 22NCVC-128–03 of 2014. Judgment for specific performance to pay the balance purchase price was entered against Centennial on 22 March 2016 however, the appellants failed to enforce the judgment against Centennial because Centennial does not have any assets and bank account.

[8] The appellants filed subsequent action under s 540 of the CA 2016 against the respondents as directors of Centennial to settle Centennial's debt on grounds that the respondents had carried out Centennial business with intention to defraud the appellants as the judgment creditor. The appellants alleged that the respondents entered into the agreement with the appellants with the intention to defraud the appellants by failing to disclose that Centennial did not have any source of income during the signing of the agreement instead used Westhill to pay the purchase price. The full particulars of fraud against the respondents are set out at para 14 in the statement of claim. The appellants claim for loss of the balance purchase price of RM2.5m and cost.

[9] The present action was proceeded against the first to third respondents. The fourth respondent did not enter appearance or file any defense. Judgment has not been entered against fourth respondent. Action against the fifth respondent was withdrawn.

[10] The first to third respondents denied the appellants' claim. The respondents in their defense raise the issue of res judicata on the appellants' action on the ground that the claim for the balance purchase price has been disposed of in Civil Suit No 22NCVC-128–03 of 2014 by the Shah Alam High Court where judgment was entered in favor of the appellants. The respondents also contended that the appellants had negligently misrepresented the respondents that the extraction of timber logs from the said land area is unrestricted and the timber logs in the said area consist of meranti trees with high quality which would bring high profit for Centennial estimated around RM80m. The respondents further pleaded that the agreement is void and unenforceable due to the provisions under the National Forestry Act 1984 which prohibits the transfer of any timber concession to third party. It is also provided in the Act that timber logs cannot be extracted on land higher than 1,000m (restricted area). The respondents claim that the appellants had defraud them by not disclosing part of the said land is restricted area. The respondents only came to know sometimes in August 2013 ie eight months after signing the agreement

DECISION OF THE HIGH COURT

[11] The learned HCJ found there are four main issues to be determined in the trial as follows:

(a) whether the respondents carried out Centennial business with the intention to defraud the appellants;

(b) whether prior to the signing of the contract, the appellants had misrepresented the respondents that the revenue from the extracted timber logs is RM80m based on unrestricted right to extract high quality timber logs from meranti trees on the said land;

(c) whether the agreement entered between the appellants and the respondents is void and unenforceable or otherwise; and

(d) whether the appellants' claim is res judicata.

[12] Having conducted the full trial and heard evidence from witnesses from both sides, based on the evidence, the learned HCJ made his finding of facts and decision which can be summarised as follows:

(a) the evidence given by the appellants is vague or not clear as to when the intention to defraud exist. What is clear only in respect of Centennial

business transaction in entering into the agreement to purchase the right to extract timber logs from the appellants;

(b) the court was satisfied based on the evidence presented that the appellants failed to prove that the respondents while representing Centennial in entering into the agreement had carried out Centennial business with the intention to defraud the appellants;

(c) the appellants never questioned Centennial financial position or status before and after entered into the said agreement. SSM search was only done after Centennial failed to pay the balance purchase price of RM2.5m;

(d) the court found that the respondents have no obligation to disclose the payment of purchase price would be made by Westhill. The appellants never questioned or objected to payment made by Westhill;

(e) the respondents' action in using Westhill for purposes of consideration to the agreement entered by Centennial is a reasonable business consideration;

(f) the court found the respondents did not have the intention to defraud the appellants when decided to represent Centennial to enter into the sale and purchase agreement;

(g) the appellants' allegations on respondents' intention to defraud the appellants are based on general allegations without showing or referred to the specific time;

(h) the court was satisfied that the appellants failed to prove the respondents intended to defraud the appellants when the respondents' made decision on behalf of Centennial not to pay the balance purchase price;

(i) the respondents discovered the representations made by the appellants that the revenue from the extracted timber logs is RM80m, based on unrestricted right to extract high quality timber logs in the said land were not correct after they pay the sum of RM4.5m. It is not true that all trees on the said land can be harvested as timber logs for profit. At the material time the respondents believed that they would not gain profit from the agreement and decided for Centennial not to pay the balance purchase price. By doing this, it merely exposed Centennial to liability under the contract;

(j) the HJC found the issue of law can be raised at any time though not pleaded. The appellants' objection is misconceived and dismissed;

(k) the court found the agreement is valid and enforceable;

(l) on the issue of res judicata, the court found it is not res judicata because the present action is based on different cause of action than the previous

A action which has been disposed of; and

(m) the appellants failed to prove on the balance of probability that the respondents have carried out the business of Centennial with the intention to defraud the appellants. The appellants' claim for reliefs under s 540 of the CA 2016 is dismissed with costs.

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THE GROUNDS OF APPEAL

[13] The appellants have set out various grounds of appeal in the memorandum of appeal and in the oral and written submissions the appellants categorised the High Court's reasoning against finding of fraudulent trading into three points ie the financial standing, part payment and misrepresentation points. The appellants submitted the learned judge erred in law and/or in fact in holding that the case for fraudulent trading against the respondents had not been made on those three reasons. We summarised the submissions as follows:

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[14] Pertaining to the financial standing of Centennial (financial standing point) the appellants submitted that the learned judge did not give any or adequate consideration to the following matters:

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(a) the respondents, as directors of Centennial, actively negotiated the terms of the agreemen;

(b) the respondents had full control, direction and management of Centennial;

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(c) with Centennial entering into the agreement under the directorship and management of the respondents, with a promise to pay the consideration sum of RM7m for the purchase of the appellants' ownership in Fave, it is warranted and expected that the respondents ought to ensure that Centennial indeed has the ability to pay the said consideration sum in accordance with the terms of the agreement;

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(d) however, at the time the agreement was entered into and at least until the trial of the underlying action, Centennial had no monies or assets at all that would enable it to meet the obligation to pay the consideration sum of RM7m pursuant to the agreement (an agreed fact). Centennial was never in a position to pay the RM7m. And, at all material times, including at the time of execution of the agreement, the respondents knew this fact. Yet, the respondents directed and caused Centennial to enter into the agreement with the appellants (leading the appellants to give up ownership in Fave);

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(e) the purpose of Centennial was to purchase the appellants' ownership in Fave for RM7m but Centennial was never in any position to pay the obligation or debt of RM7m when it fell due. And the respondents knew this fact and it was by the respondents' design;

(f) it is an unwarranted burden to place on the appellants to have to carry out a search or enquire on Centennial's financial standing prior to entering into the agreement . The appellants ought to be entitled to rely on the promises made in and the terms of the agreement in respect of payment of the RM7m. The respondents, being directors of Centennial, ought to ensure that Centennial was in a position to meet that debt or payment obligation when it fell due; and

(g) to otherwise place such a burden on the appellants is akin to saying that the appellants were careless and carelessness on the part of the victim (appellants) has never been a defence to an action for fraud

[15] Pertaining to the part payment made by Westhill (part payment point), the appellants submitted that the learned judge did not give any or adequate consideration to the following matters:

(a) part-payment of the RM7m (in the amount of RM4.5m) was made by Westhill and not by Centennial who was the party contracted to the agreement . The respondents are themselves directors in Westhill and the decision to not put money into Centennial was a conscious and deliberate decision of the respondents, despite them having full knowledge that Centennial was obligated under the agreement to pay the RM7m to the appellants, and that if Centennial was not given the necessary funds or if the respondents and/or Westhill decides against paying the RM7m in its entirety, the appellants would be unable to seek recovery against Centennial by reason of it being left completely without funds and/or assets;

(b) the 'explanation' provided by the respondents' witnesses at trial, namely SD1 and SD2, as to why monies/funds were not put into Centennial to pay the RM7m was not pleaded and therefore, should have been disregarded. Also, at trial, the learned judge himself had ruled that as the respondents had not pleaded in their defence the reasons for not putting money into Centennial, these explanations surfacing for the first time during trial should not be allowed;

(c) any monies put into Centennial (a company) belongs to Centennial and not the private purse of shareholders (who are entitled only to dividends, if any); and monies put into Centennial to fund the purchase of Fave would have to be paid to the appellants until the consideration sum is fully settled. The 'other two shareholders' would not have any direct claim over the injected purchase funds;

(d) the respondents had not pleaded as part of their defence the purported applicability of s 2(d) of the Contracts Act 1950. On this point, the learned judge had effectively made out a case for the respondents, which the court ought to refrain from doing; and

(e) at any rate, s 2(d) of the Contracts Act 1950 is not applicable as it was not the appellants whom had solicited or desired that Westhill make payment.

[16] Pertaining to misrepresentation allegedly made by the appellants (misrepresentation point), the appellants submitted that the learned judge did not appreciate the following matters adequately:

(a) there is no evidential basis at all that the appellants made any representations whatsoever to the respondents regarding the profitability or existence or absence of restrictions pertaining to the logging concession;

(b) the agreement expressly states that the appellants did not make any representations whatsoever in respect of the logging land and/or its potential in respect of the logging and related activities. In this respect, the learned judge had failed to judicially appreciate the intent and meaning of cl 9.1(f) of the agreement;

(c) in a previous suit between the appellants and Centennial in the Shah Alam High Court (ie Suit No 22NCVC-128–03 of 2014), where SD1 and SD2 also testified, Centennial had pleaded the defence of misrepresentation but the said defence was dismissed by the High Court in that action. No appeal was brought against the decision. The respondents are privies of Centennial and thus, res judicata ought to apply to bar the respondents from re-raising, re-agitating and re-litigating the defence or issue of misrepresentation; and

(d) under the agreement, the obligation to pay the consideration sum of RM7m in its entirety is not at all dependant on profits being generated by Centennial from the logging activities. The consideration sum of RM7m was to be settled in full before the logging activities were due to commence.

THE ISSUES

[17] Having considered the facts of the case, the learned HCJ formed up the issues whether the respondents carried out Centennial business with the intention to defraud the appellants and whether prior to the signing of the agreement the appellants had misrepresented the respondents that the income from the extracted timber is RM80m based on unrestricted right to extract timber logs of high quality from meranti trees on the said land to be determined.

[18] We are also of the same view that this appeal is only concern on the decision of the High Court on these two main issues.

[19] Although the issues whether the agreement entered between the appellants and the respondents is void and unenforceable or otherwise and whether the appellants' claim is res judicata were part of the issues to be determined and has been decided the learned HCJ, there is no appeal against the decision of those issues therefore, it is not issues before this court. The learned HCJ held that it is not res judicata because the present action is based on different cause of action than the previous High Court action which has been disposed of and the agreement entered between the appellants and Centennial is valid and enforceable.

SECTION 540 OF THE CA 2016

[20] The appellants suit against the respondents is based on s 540(1) of the CA 2016 which under the repealed Companies Act 1965 is equivalent to s 304(1) of the repealed Act. Section 540(1) provides as follow:

> If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if the Court thinks it proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[21] Justice Vernon Ong (now FCJ) explained in *Kawin Industrial Sdn Bhd (in liquidation) v Tay Tiong Soong* [2009] 1 MLJ 723 at (para 12) that the wording of the section is very clear. It is not necessary in order to establish fraud that the creditors were in fact defrauded. An intention to defraud is sufficient. In this respect, an intent to defraud is an intent to deprive ([2009] 1 MLJ 723 at p 733) creditors, or some creditors, of an economic advantage or inflict upon them some economic loss (see *Coleman v The Queen* (1987) 5 ACLC 766). Further, at (para 13) said that in the context of the facts of this case s 304(1) provides that if it appears that any business of the company has been carried out with intent to defraud the creditors of the company or for any fraudulent purpose, the court may on application of the liquidator declare that a person who was knowingly a party to the carrying of the business in that manner shall be personally responsible for all or any of the debts of the company as the court directs. Essentially, it is a matter of making a finding of facts.

[22] Justice Mary Lim (now FCJ) in *Chin Chee Keong v Toling Corp (M) Sdn Bhd* [2016] 3 MLJ 479) at (para 59) citing *R v Grantham* [1984] QB 675 observed that fraudulent intend may be made out if it is shown that a person intends by deceit to induce a course of conduct in another which puts that other's economic interests in jeopardy, even though he does not intend that actual loss should ultimately be suffered by that other. In *Chee Pok Choy & Ors*

v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346 the court says that charges of fraud and collusion must be proved by those who make them, prove by established facts or inferences legitimately drawn from those facts taken together as a whole. in *Yee Poh Nyen v Raji bin Kasan & Ors* [2018] MLJU 1108 the court held that the law however does not require direct evidence, but recognises that frauds are commonly proved on the basis of inviting the fact-finder to draw proper inferences. In *Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 MLJ 569, the Court of Appeal recognised that an intent to defraud may be inferred where the business of a company had been carried on to incur debts at a time when there is to the knowledge of the directors no reasonable prospects of the creditors ever receiving payment of those debts.

[23] It is also settled law that the burden of proof in a suit or proceeding lies on that person would fail if no evidence at all given on either side and the burden of proof as to any particular fact lies on that person who wishes the court to believe its existence (ss 101 and 103 of the Evidence Act 1950).

[24] On the standard of proof, the Federal Court held that sub-s 304(1) itself sets the standard of proof that must be met. The term if 'it appears' is deployed in the provision and this clearly indicates that a lower degree of proof is required. That lower degree of proof is on a balance of probabilities. It cannot go any lower than the civil burden of proof (see: *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] CLJ 584).

ANALYSIS AND DECISION

[25] As a whole the appellants submitted the HCJ did not give any or adequate consideration to the case before him in finding that there is no fraudulent trading against the respondents on grounds raised in the submissions. We will analyse the two main issues.

Whether the respondents carried out Centennial business with the intention to defraud the appellants

[26] We have considered the appellants oral and written submissions and in gist the appellants were saying that they have evidence that the respondents have the intention to defraud the appellants when they represented Centennial to enter into the agreement to purchase the right to do logging from Fave. The evidence is such that before signing the agreement, Centennial did not have money to pay the purchase price. Centennial was established mainly as vehicle to be used by the respondents to buy the right to do logging only but never involved in other businnesess and any bank account. This facts were never disclosed to the appellants during the signing of the said agreement. The appellants did not know of this fact and only knew it when part of the purchase

price in RM4.5m was paid by Westhill after they tried to enforced the court order vide garnishment order. It was submitted that despite Centennial has no financial standing and capability to pay the purchase price, yet the respondents directed Centennial to enter into the agreement with the appellants.

[27] We noted that the similar arguements were made before the High Court that the respondents have the intention to defraud the appellants from the very beginning when entering into the agreement to buy the right to do logging. The respondents have control over Centennial as directors of Centennial. The first and second respondents also have complete controlled over Fave as partners after the agreement was signed. It was further submitted that in that circumstances, the respondents have the intention to defraud the appellants vide the purchase agreement because by purchasing the logging right using centennial as vehicle, the respondents can avoid being personally responsible against any liability that may incur in future if the purchase price is not paid. The decision not to pay would become Centennial's liability and not respondents' liability.

[28] We have scrutinised the grounds of judgment of the learned HCJ and we are satisfied that the learned HCJ had in fact considered the evidence before him and the appellants' submissions before arriving into his decision. We have also considered the appellants' pleaded particulars of the alleged fraud at para 14 in the statement of claim against the respondents and we agree with the learned HCJ in his judgment that all the allegations on the intention to defraud were general allegations without specifically stating the time of commission of the fraud. In his judgment, we believe the learned HCJ has considered the appellants pleading as well and come to such conclusion when the appellants failed to prove the allegations made against the respondents.

[29] The learned HCJ has made a finding that the appellants failed to prove or offer any evidence to show when the intention to defraud existed but what is clear before him is the evidence in respect of Centennial's business of purchasing the timber logging right from the appellants. It is also the finding of the learned HCJ that the evidence only shows that the respondents carried on Centennial' business in the purchase of timber logging right at the time when they represented Centennial in negotiating the purchase until signing the agreement and at the time when they made decision for Centennial not to pay the balance purchase price of RM2.5m.

[30] In this appeal, we cannot go beyond the finding of fact by the learned HCJ based on the evidence he has considered. In the trial at the High Court, the appellants called only one witness SP1 as their witness to testify and SP1 agreed that he had no prove to show that the respondents had the intention to defraud but stated that Centennial did not have the money to pay so, the

respondents must pay. SP1 admitted that the appellants never written to the respondents complaining about any fraud before filing action in court. We find the learned HCJ is correct to conclude that there is no evidence that the respondents were carrying out Centennial's business with the intention to defraud the appellants after assessing the whole evidence.

[31] The learned HCJ was in fact satisfied that based on the evidence, the respondents when acting for Centennial in the agreement had not carried on Centennial' business with the intention to defraud the appellants as creditors. It is also a finding of fact that the appellants were in fact aware and consciously knew about Centennial's financing standing before they enter into the agreement and knew that Centennial was only used as vehicle for the respondents to obtain the right to do timber logging. The learned HCJ also found that the appellants never raised any complaint, question or objection relating to Centennial' financial standing. This according to the HCJ shows that the appellant were never in doubt on the capability of Centennial to pay the purchase price. We agree with the respondents' submission that the appellant had agreed to sign the agreement with Centennial despite Centennial was only registered on 28 June 2012 and without any assets and business.

[32] The appellants were represented by the legal firm of Lee Yang & Boo. They were in position to inquire or raise any issue relating to Centennial's assets, financial, bank account or the record of business activities before signing the said agreement. We are also of the view that, it is not wrong for the learned HCJ to have found that if the appellants were in doubt on Centennial's capability and status, the appellants can always find out from the Companies Commission of Malaysia before signing the agreement . In our view this has always been the practice and prudent for parties to do before entering into an agreement. But in this case the search was only done after Centennial failed to pay the balance purchased price of RM2.5m.

[33] The court found that the respondents have no obligation to disclose the payment of purchase price would be made by Westhill. The appellants argued that even though the respondents had no legal obligation to divulge Centennial's true financial standing when entering into the agreement but they did not expect dishonest dealing by the respondents who actively negotiated the terms of the agreement. Some authorities were cited to support the argument that the carelessness on the part of the victim was never a defense to an action for fraud (see: *China Idea Development Ltd v Ooi Kee Liang & Ors and another case* [2020] 8 MLJ 527). No fraudster shall ever be exonerated off of liability merely by contending that the victim of the fraud was 'gullible' enough to be fooled by the fraud (see: *Maybank Islamic Bhd v Aldwich Enviro-Management Sdn Bhd* [2015] MLJU 1977) and it is doubtful if the victim-blaming works to exculpate the defendants from liability (see: *PBJ*

Construction Sdn Bhd v Anwar Yeo Abdullah & Anor [2021] 9 MLJ 386).

[34] The submission is merely to say that the courts do not countenance victim-blaming where fraud and dishonesty is involved and that learned HCJ did not consider the matters set out above. The High Court made an erroneous conclusion that Centennial's inability to pay the consideration of RM7m from the outset (by design) cannot be a supporting or circumstance for finding fraudulent and/or dishonest trading on the part of the respondents.

[35] In our view the argument is the same of which the HCJ had addressed in his judgment that based on the evidence and importantly the evidence shows that the appellants were in fact had entered into the agreement voluntarily with conscious mind relating to Centennial position. We agree with the respondents' submission that the reasons related to Centennial's assets, financial standing, bank account and business records are only excuses and afterthought. The appellant cannot approbate and reprobate after agreed to enter into agreement with Centennial and later alleged that Centennial was used as vehicle to defraud them when Centennial's financial position was never raised before by the appellants and they knew about it.

[36] The appellants submitted that the intention to defraud the appellant is very clear when Westhill paid the payment instead of Centennial. This fact was never informed to the appellants. It is not disputed that the appellants had received part payment of RM4.5m from the Westhill. It never in evidence that the payment of RM4.5m as consideration was paid by mistake or wrongly made but was accepted without any queries or objection or any attempt to refund the money or terminate the agreement even after finding the money does not come from Centennial. In our view, had the balance purchased price of RM2.5m was paid, the issue of money paid by Westhill would never become an issue. We find this argument by the appellants is without merit.

[37] The evidence shows that Centennial is closely related to Westhill. Westhill is the majority shareholders in Centennial. The first and second respondents are directors in both Centennial and Westhill and the respondents made arrangement that payment be made by Westhill. The learned HCJ had considered the explanation from the respondents and satisfied that the explanation is reasonable and accepted the explanation. As alluded to earlier, the appellants never objected to Westhill made the payment.

[38] The learned HCJ held that under s 2(d) of the Contracts Act 1950, consideration to the agreement can be made or given by third party. The respondents used Westhill to give consideration to the agreement entered by Centennial is a reasonable business consideration. The consideration given on behalf of Centennial is a good consideration and valid. The arrangement made

for Westhill to pay the purchase price is not an intention to defraud the appellants.

[39] The appellants argued that the respondents did not plead nor argued their case on the back of s 2(d) of the Contracts Act 1950. The learned HCJ had effectively made out a case for the respondents which he should not have done. We find this argument has no merit. The HJC found the issue of law can be raised at any time though not pleaded. We agree with the learned HCJ. An issue of law may be raised at any stage of the proceedings with or without notice (see: *Dato' Seri Anwar Ibrahim v Tun Dr Mahathir bin Mohamad* [2011] 1 MLJ 145; *Merong Mahawangsa Sdn Bhd v Dato Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619).

[40] Section 2(d) of the Act requires that the act constituting the consideration must move from the promise or any other person and at the desire of the promisor. The act, abstinence or promise must be done or given at the request of the promisor. This means that consideration may be provided by a person other than the promisee. It does not mean consideration need not be provided at all (see: *Overseas Chinese Banking Corporation Ltd v Woo Hing Brothers (M) Sdn Bhd* [1992] 2 MLJ 86 at p 95). Consideration under the Contracts Act may move from a third party (see: Visu Sinnadurai *Law of Contract in Malaysia and Singapore* (2nd Ed) at p 112. We agree with the learned HCJ that there was nothing unusual in the respondents causing the part payment of RM4.5m to be paid via Westhill (instead of Centennial).

[41] The learned HCJ after carefull consideration of the whole evidence he made a finding that the respondents did not have intention to defraud the appellants when representing Centennial in entering into the said agreement.

Whether appellants had misrepresented the respondents that the right to do timber logging on the said land is an unrestricted right

[42] The learned HCJ has also found that the appellants failed to prove the respondents' intention to defraud the appellants when making decision not to pay the balance sum of RM2.5m based on the defence of misrepresentation by the respondents. The appellants objected to misrepresentation issue however, the learned HCJ dismissed the objection on the ground that the defence raised is not to show that the agreement entered would become void and terminated because of misrepresentation issue but only to show that the respondents never had the intention to defraud the appellants when entering into the said agreement and making decision not to continue paying the balance purchase price.

[43] The appellants submitted that the learned HCJ's reasoning is flawed. The respondents did not put its purported case of misrepresentation to SP1 (appellants' witness) at trial. Further, the allegations of misrepresentation were raised and rejected in the Centennial action, where first and third respondents testified. No appeal was brought. The respondents are privies of Centennial. Thus, the principle of res judicata prohibits the relitigating of the misrepresentation allegations.

[44] The learned HCJ already found that res judicata issue does not apply because the present action is based on different cause of action than the previous action which has been disposed of. Similarly, the argument raised here is also has no merit. Be that as it may, the learned HCJ agreed with the respondents' defense based on the evidence and not on a mere conjecture or suspicion. He found the misrepresentation in fact was made to the respondents by the appellants and the respondents were attracted to buy the timber logging right based on the representations made. It was represented to the respondents that the profit from the timber logs extracted from the said land is estimated at RM80m. However, the respondents discovered that a large area of the said land is a restricted area of which timber logging activities are prohibited. It means that not all the trees on the said land can be harvested as timber logs to generate income. Based on the restriction, the profit cannot reach RM80m as promised. SP1 estimated the income would only around RM24m. The respondent only came to know after they paid the payment of RM4.5m. The respondents believed that they would not gain benefit or profit from the said agreement hence, decided not to pay the balance purchase price. The decision may result in Centennial to breach the agreement . The learned HCJ made the finding that the respondents have proved that the reason not to continue paying the balance purchase price is business decision and the decision made is not an intention to defraud the appellants.

[45] The learned HCJ accepted the submissions from the respondents that the appellants had abused the process of court by making Centennial's liability as the respondents' personal liability. The decision not to pay the balance purchase price is a company's decision and is the company's debt. The respondents cannot be held liable on the company's debt based on the principle of separate legal entity. A company is a separate legal personality from its shareholders (see: *Yahya Mohd Khalid v MISC Berhad* [2020] MLJU 77 and *Chan Kok Thin @ Chan Kok Cheng & Anor v Chan Yock Cher @ Chan Yock Kher & Ors* [2000] MLJU 44). In any event, based on the evidence, the learned HCJ has found that the respondents never had the intention to defraud the appellants when entering into the said agreement.

A CONCLUSION

[46] We refer to the Federal Court case of *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1, where it says that it is settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong. At para [62], reaffirmed the Malaysian position has always been that, a decision that is arrived at, due to a lack of judicial appreciation of evidence is plainly wrong. The Federal Court case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 call for consideration as to what constitutes as the 'plainly wrong' test. At para [64] confirming the 'plainly wrong' test was also applied by the Federal Court in *UEM Group Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2010] MLJU 2225; [2010] 9 CLJ 785, where it was held that:

[26] ... the prime issue in respect of questions 1 to 3 is whether the Court of Appeal had erred in interfering with the findings of facts of the trial judge. It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b; [1978] 1 LNS 32; *Watt or Thomas v Thomas* [1947] AC 484; and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309). At para [70] it says that appellate interference would only be justified in situations where the trial court has been 'plainly wrong' has been repeatedly affirmed in the latest decisions of this court: see *Director of Forest Sarawak & Ors v Nicholas Mujah ak Ason & Ors* [2020] 1 MLJ 612; [2020] 2 CLJ 1 at paras [73]–[74] and *Jeli Anak Naga & 4 Others v Tung Huat Pelita Niah Plantation & Ors and another appeal* [2019] MLJU 1311; [2020] 1 CLJ 449 at para [49]. At para [72] explained that the phrase 'lack of judicial appreciation of evidence' used in *Gan Yook Chin* could very well encompass three out of four errors of a trial judge (other than the 'material error of law') said to be identifiable by Lord Reed in *Henderson*, namely: (a) critical factual finding which has no basis in evidence; (b) demonstrable misunderstanding of relevant evidence; and (c) demonstrable failure to consider relevant evidence. Most importantly, at para [76], the Federal Court reminded the appellate judges that what is pertinent is that, the 'plainly wrong' test is not intended to be used by an appellate court as a mean to substitute its own decision for that of the trial court on the facts. Where in arriving at the decision it could not reasonably be explained or justified and so was one which no reasonable judge could have reached. If the decision did not fall within any of the aforesaid category, it is irrelevant, even if the appellate court thinks that with whatever degree of certainty, it considered that it would have reached a different conclusion from the trial judge.

[47] Following the principle laid down in Federal Court judgment, the outcome of the present appeal would therefore turn upon whether the findings of the learned trial judge were reasonably made.

[48] With the clear facts and circumstances of the case and the evidence before the court and the finding that learned HCJ has made in arriving into his decision, it cannot be said that the learned HCJ has failed to appreciate the evidence before him and his decision is plainly wrong. We are satisfied that the finding of the learned HCJ is reasonable and correct which does not warrant our interference.

[49] In the result we dismissed the appellants' appeal with costs of RM10,000 subject to allocator.

Appeal dismissed.

Reported by Ahmad Ismail Illman Mohd Razali